

1                                   **IN THE UNITED STATES DISTRICT COURT**  
2                                   **FOR THE DISTRICT OF PUERTO RICO**

3  
4           **GIL A. RODRIGUEZ-RAMOS,**

5                   **Plaintiff,**

6                   **v.**

7           **RUBEN A. HERNANDEZ-GREGORAT,**  
8           **et al.,**

9                   **Defendants.**

**Civil No. 09-1603 (GAG)**

10                                   **OPINION AND ORDER**

11           On July 7, 2009 the plaintiff in this case, Gil A. Rodriguez Ramos (“Rodriguez”), filed a  
12 verified complaint against Ruben Hernandez Gregorat (“Hernandez”), Secretary of Transportation  
13 and Public Works, Santos M. Delgado Marrero (“Delgado”), President and General Manager of the  
14 Metropolitan Bus Authority (“AMA” by its acronym from the Spanish “Autoridad Metropolitana  
15 de Autobuses”), Gladys Fuentes Cruz (“Fuentes”), Vice President of the AMA’s Human Capital  
16 Management Office, Judith Morales Morales (“Morales”), Special Aide to the President of the  
17 AMA, and the AMA’s insurance company. The plaintiff claims that the defendants stripped him  
18 of his functions and demoted him because of his political affiliation. He brings this action pursuant  
19 to 42 U.S.C. § 1983, alleging violations of his right to due process, equal protection, and freedom  
20 of political expression under the Constitution of the United States, as well as several Puerto Rico  
21 laws and the Constitution of the Commonwealth.

22           Presently before the court is defendants’ motion to dismiss plaintiffs’ claims pursuant to Rule  
23 12(b)(6) (Docket No. 19), which was timely opposed by plaintiffs (Docket No. 25). For the reasons  
24 set forth herein, the court **GRANTS** defendants’ motion to dismiss (Docket No. 19).

25           **I.       Relevant Background as Alleged in the Complaint**

26           The plaintiff, Rodriguez, has worked in the government of the Commonwelath of Puerto  
27 Rico, in both career and trust positions, since 1991. In January 2000 he was admitted to the practice  
28 of the legal profession. Rodriguez is also a life long member of the Popular Democractic Party  
          (“PDP”) and over the past twenty years has held a number of different positions within that party:

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1 member of the Popular Youth; member of the Autonomous Youth Movement of the PDP in the  
2 University of Puerto Rico; PDP electoral representative in different electoral units; PDP precinct  
3 president; PDP presidential delegate; president of the PDP Public Servants; and member of the PDP  
4 Governing Board. The plaintiff was also a member of PDP Governor Anibal Acevedo Vila's cabinet  
5 as Executive Director of the Medical Emergency Corps and Administrator of the General Services  
6 Administration. Rodriguez also avers that he still participates in television, radio, and other media  
7 outlets, where he openly presents himself as a member of the PDP and an advocate of its ideals. The  
8 plaintiff further states that all of the defendants are members of the opposing political party, the New  
9 Progressive Party ("NPP").

10 Plaintiff commenced his public employment with the Commonwealth in January 1991, as  
11 a career employee in the Office of the Governor. There he held the career position of Executive  
12 Official III. In March 1994, the plaintiff was transferred to the Administration of Corrections  
13 ("AOC"), where he was appointed to the career position of Administrative Assistant in the Personnel  
14 Division by the Administrator of AOC. In November of the same year, the plaintiff was assigned  
15 to the Office of Legal Affairs, where he worked as a Legal Technician. In 1995, the plaintiff was  
16 admitted to the study of law at the Hostos School of Law as a night student and obtained his Juris  
17 Doctor in May 1998. In January 2000, after passing the Puerto Rico Bar Examination, Rodriguez  
18 was admitted to the practice of law in the Commonwealth of Puerto Rico.

19 On April 1, 2000, the plaintiff was appointed to the career position of Attorney I at the AOC,  
20 after taking the competitive exam for the position and achieving the highest score of all eligible  
21 applicants. On January 9, 2001, the plaintiff was appointed Director of the Office of Legal Affairs  
22 at the AOC. A couple of months later, he was appointed Deputy Administrator in Management and  
23 Administration at the AOC, a position in the trust service. On April 22, 2002, the plaintiff was  
24 appointed Assistant Secretary of Investigations of the Department of Corrections and Rehabilitation  
25 and, almost a year later, he was appointed Sub-Administrator of the AOC, both positions in the trust  
26 service. On July 29, 2005, he was reassigned to the career position of Attorney I, effective  
27 September 1, 2005. On September 16, 2005, Rodriguez was transferred to the position of Deputy  
28 Chief of Administration in the Medical Emergency Corps. A year after that, he was also appointed  
by then Governor Acevedo Vila to the position of Administrator of the General Services, a position

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1 of trust. On November 26, 2007, Rodriguez was named Chief of the Medical Emergency Corps and,  
2 almost a year after that, he was reinstated in his career position as Attorney in the General Services  
3 Administration. On December 17, 2008, the plaintiff was appointed Special Assistant to the  
4 President of the AMA, a position in the trust service.

5 Following the 2008 elections, on or about January 7, 2009, defendant Delgado was named  
6 President and General Manager of the AMA by defendant Hernandez, who had been named  
7 Secretary of Transportation and Public Works by the new Governor of Puerto Rico, Luis Fortuño,  
8 President of the NPP. Upon the appointment of Delgado as head of the AMA, the plaintiff presented  
9 a letter of resignation from the trust position of Special Assistant to the President of the AMA and  
10 requested to be reinstated in his career position as Attorney. The plaintiff alleges that he did this “at  
11 the defendants’ request.” (Docket No. 1 at ¶ 37.) On that same date, Rodriguez also requested to  
12 meet with Delgado, but the latter did not act upon these requests. On January 30, 2009, the plaintiff  
13 wrote Delgado once again requesting his reinstatement as Attorney, but there was no response. From  
14 January to June 2009, Rodriguez alleges that he was still in the trust position of Special Assistant  
15 to the President, but that he was left without functions and relegated to occasional assignments of  
16 legal work. Between January and February, defendant Delgado ordered that the plaintiff’s internet  
17 access be removed. On or about March 9, 2009, the Executive Secretary to the President told the  
18 plaintiff not to worry, because the President had granted his reinstatement request.

19 On or about May 28, 2009, the union attorney referred a sexual harassment grievance to  
20 Rodriguez. The next day, the acting director of the Industrial Area told the plaintiff that the  
21 President had instructed him that Rodriguez was not to handle the matter, because the President had  
22 assigned all legal matters to outside counsel. Between January and June 2009, Delgado engaged  
23 outside attorneys to do legal work at a contract price of approximately \$30,000 monthly, rather than  
24 assign Rodriguez to the career position of Attorney at the AMA. On June 15, 2009, the plaintiff  
25 asked the Vice President of the Human Capital Management Office, defendant Fuentes, about his  
26 reinstatement request in the presence of defendant Morales, who was Special Aide to the President  
27 in personnel matters. Fuentes replied that she was not working on that matter and had no  
28 information on it, since the request was being handled directly by defendant Delgado without the  
intervention of the Human Resources personnel. During this time, the plaintiff was still employed

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1 as a Special Assistant to the President, yet was not invited to staff meetings or to any activities which  
2 other trust employees of the AMA were attending. He neither performed the duties of a Special  
3 Assistant nor those of an Attorney. On most work days, no functions were assigned to him.

4 Rather than assign him to the requested position of Attorney, in a letter dated June 22, 2009,  
5 defendant Delgado appointed the plaintiff to a position he had never held before, as Bus Terminal  
6 Administrator, effective July 1, 2009. On June 25, 2009, the plaintiff requested permission to review  
7 his personnel file through a standard written form, but was told to submit a written letter to that  
8 effect, a treatment that the plaintiff avers is different than that received by other employees. On June  
9 30, 2009, Rodriguez presented the written communication requesting to examine his personnel file.  
10 He was never given the requested access. At no time prior to Rodriguez's transfer to the position  
11 of Bus Terminal Administrator did any of the defendants or any other member of the Human  
12 Resources staff confer or meet with the plaintiff to discuss his reassignment.

## 13 II. Standard of Review

14 Under Rule 12(b)(6), a defendant may move to dismiss an action against him for failure to  
15 state a claim upon which relief can be granted. See Fed.R.Civ.P. 12(b)(6). When considering a  
16 motion to dismiss, the court must decide whether the complaint alleges enough facts to "raise a right  
17 to relief above the speculative level." See Bell Atl. Corp. v. Twombly, 550 U.S. 544, 127 S. Ct.  
18 1955, 1965 (2007). In so doing, the court accepts as true all well-pleaded facts and draws all  
19 reasonable inferences in the plaintiff's favor. Parker v. Hurley, 514 F.3d 87, 90 (1st Cir. 2008).  
20 However, "the tenet that a court must accept as true all of the allegations contained in a complaint  
21 is inapplicable to legal conclusions." Ashcroft v. Iqbal, --- U.S. ---, 129 S.Ct. 1937, 1949 (2009).  
22 "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements,  
23 do not suffice." Id. (citing Twombly, 550 U.S. at 555). "[W]here the well-pleaded facts do not  
24 permit the court to infer more than the mere possibility of misconduct, the complaint has alleged  
25 --but it has not 'show[n]-- 'that the pleader is entitled to relief.'" Iqbal, 129 S. Ct. at 1950 (quoting  
26 Fed.R.Civ.P. 8(a)(2)).

27 In sum, when passing on a motion to dismiss the court must follow two principles: (1) legal  
28 conclusions masquerading as factual allegations are not entitled to the presumption of truth; and (2)  
plausibility analysis is a context-specific task that requires courts to use their judicial experience and

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1 common sense. Id. at 1949-50 (citing Twombly, 550 U.S. at 555-56). In applying these principles,  
2 courts may first separate out merely conclusory pleadings, and then focus upon the remaining well-  
3 pleaded factual allegations to determine if they plausibly give rise to an entitlement to relief. Iqbal  
4 129 S. Ct. at 1950.

### 5 III. Discussion

6 The defendants argue that (1) the plaintiff has failed to state a claim under section 1983 and  
7 under the First and Fourteenth Amendments; and (2) the claims under supplemental jurisdiction  
8 should be dismissed.<sup>1</sup> The court will address each of these averments in turn.

#### 9 A. Section 1983

10 Plaintiff brings his claim for the violation of his constitutional rights under the First and  
11 Fourteenth Amendments pursuant to Section 1983. This disposition “provides a remedy for  
12 deprivations of rights secured by the Constitution and laws of the United States when that  
13 deprivation takes place ‘under color of any statute, ordinance, regulation, custom, or usage, of any  
14 State [ . . . ].’ ” Lugar v. Edmondson Oil Co., 457 U.S. 922, 924 (1982) (quoting 42 U.S.C. § 1983).  
15 In order for a claim to be cognizable under section 1983, a plaintiff must plead and prove three  
16 elements of the cause of action: (1) that the defendants acted under color of state law; (2) that  
17 plaintiffs were deprived of federally protected rights, privileges or immunities; and (3) that the  
18 defendants’ alleged conduct was causally connected to the plaintiff’s deprivation.  
19 Gutierrez-Rodriguez v. Cartagena, 882 F.2d 553, 558 (1st Cir. 1989).

20 The first element is satisfied in this case against all defendants because the plaintiff alleged  
21 that all four defendants are officials of the AMA and that they acted in their capacity as such to alter  
22 the conditions of plaintiff’s employment. The second element shall be discussed at subsections B,  
23 C, and D infra. The third element –causal connection–, is satisfied as to defendant Delgado, since  
24 the plaintiff’s factual allegations, taken as true, point to this defendant as the one who made the  
25 decision to transfer the plaintiff to the position he currently holds as Bus Terminal Administrator.

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28 <sup>1</sup> The defendants also argue that the claims for monetary relief against co-defendant Hernandez in his official capacity are barred by the Eleventh Amendment. Given the court’s ultimate disposition of the plaintiff’s claims, this issue is moot.

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1 It is not satisfied, however, as to defendants Hernandez, Fuentes, and Morales. The only  
2 participation that Hernandez could have had, per the factual allegations in the complaint, is limited  
3 to the appointment of Delgado as head of the AMA. Similarly, the only factual allegations as to the  
4 other two defendants are that Fuentes-Cruz told the plaintiff, in front of Morales, that she was not  
5 working on his case because the transfer request was being handled directly by Delgado, without the  
6 intervention of the human resources personnel. Because of the positions that these defendants hold  
7 within the AMA, the plaintiff makes an implicit assumption that these defendants participated in the  
8 decision to transfer the plaintiff. However, there are no additional factual allegations to tie  
9 Hernandez, Fuentes, or Morales to the deprivation of the plaintiff's constitutional rights. See Iqbal,  
10 129 S. Ct. at 1949 (quoting Twombly, 550 U.S. at 570) ("To survive a motion to dismiss, a  
11 complaint must contain sufficient factually matter, accepted as true, to 'state a claim to relief that is  
12 plausible on its face.'"). Plaintiff's assumption is, therefore, insufficient to sustain a section 1983  
13 claim.

14 The plaintiff attempts to bolster his implicit participation argument by reference to  
15 Metropolitan Bus Authority Act, P.R. Laws Ann, tit. 23 §§ 601 et seq., which he argues places in  
16 the hands of the Secretary of Transportation and Public Works (defendant Hernandez) all necessary  
17 personnel transactions at the AMA and requires that they be made in consultation with the Chief of  
18 Personnel of the AMA, whom the plaintiff identifies as the Vice President of the Human Capital  
19 Management Office (defendant Fuentes) and the Special Aide to the President (defendant Morales).  
20 He also cites the Reorganization Plan of 1971, P.R. Laws Ann. tit. 3, § 414, which purportedly also  
21 placed the functions of the AMA's Board of Directors in the hands of the Secretary.  
22 Notwithstanding the cited legal dispositions, however, the plaintiff's allegations remain conclusory,  
23 since no additional facts are alleged to suggest that these defendants in fact participated in the  
24 decision.

25 In the absence of a properly articulated claim against Hernandez, Fuentes, and Morales, the  
26 court **DISMISSES** all of the plaintiff's section 1983 claims against these defendants.

### 27 **B. Political Discrimination**

28 The First Amendment right to freedom of speech protects non-policymaking public  
employees from adverse employment decisions based on political affiliation. See Padilla-García v.

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1 Guillermo Rodríguez, 212 F.3d 69, 74 (1st Cir. 2000); see also Rutan v. Republican Party of Ill., 497  
2 U.S. 62, 75-76 (1990); Branti v. Finkel, 445 U.S. 507, 516 (1980); Elrod v. Burns, 427 U.S. 347, 354  
3 (1976). In order to establish a claim of political discrimination, a plaintiff initially bears the burden  
4 of showing that he or she engaged in constitutionally protected conduct and that political affiliation  
5 was a substantial or motivating factor behind the challenged employment action. Gonzalez-Blasini  
6 v. Family Dept., 377 F.3d 81, 85 (1st Cir. 2004) (citing Mount Healthy City Sch. Dist. Bd. of Educ.  
7 v. Doyle, 429 U.S. 274, 287 (1977); Cosme-Rosado v. Serrano-Rodriguez, 360 F.3d 42, 47 (1st Cir.  
8 2004)). To establish a *prima facie* case, the plaintiff must show, or (for the purposes of Rule  
9 8(a)(2)) properly plead, that (1) the plaintiff and the defendant belong to opposing political  
10 affiliations, (2) the defendant has knowledge of the plaintiff's affiliation, (3) a challenged  
11 employment action occurred, and (4) political affiliation was a substantial or motivating factor  
12 behind the challenged employment action. Martin-Velez v. Rey-Hernandez, 506 F.3d 32, 39 (1st  
13 Cir. 2007) (citing Peguero-Moronta v. Santiago, 464 F.3d 29, 48 (1st Cir. 2006) (quoting Gonzalez-  
14 Blasini, 377 F.3d at 85-86)).

15 Here, the plaintiff has failed to adequately plead the fourth element of his *prima facie* case:  
16 that his political affiliation was the substantial or motivating factor in Delgado's decision regarding  
17 his transfer. Evidence that a plaintiff held a trust position under a previous administration of  
18 opposing political affiliation, and that the plaintiff is a well-known supporter of a different political  
19 party, may not suffice to show that a challenged employment action was premised upon political  
20 affiliation. Gonzalez-Blasini, 377 F.3d at 85-86. Demonstrating political animus "requires more  
21 than merely juxtaposing a protected characteristic –someone else's politics– with the fact that [the]  
22 plaintiff was treated unfairly." Padilla-Garcia, 212 F.3d at 74. Additionally, the First Circuit has  
23 held that "[m]ere temporal proximity between a change in administration and a public employee's  
24 dismissal is insufficient to establish discriminatory animus." Peguero-Moronta, 464 F.3d at 53  
25 (quoting Acevedo-Diaz v. Aponte, 1 F.3d 62, 69 (1st Cir. 1993)).

26 Since the plaintiff has failed to make fact-specific allegations that a causal connection exists  
27 between his transfer and his political affiliation, the plaintiff's section 1983 political discrimination  
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claim against defendant Delgado is **DISMISSED**.<sup>2</sup>

### C. Procedural Due Process

A viable procedural due process claim must demonstrate a “deprivation by state action of a constitutionally protected interest in ‘life, liberty, or property’ . . . without due process of law.” Romero-Barcelo v. Hernandez-Agosto, 75 F.3d 23, 32 (1st Cir. 1996) (citations omitted). “The Due Process Clause of the Fourteenth Amendment protects government employees who possess property interests in continued public employment.” Ruiz-Casillas v. Camacho-Morales, 415 F.3d 127, 134 (1st Cir. 2005) (citing Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1985); Galloza v. Foy, 389 F.3d 26, 33 (1st Cir. 2004)). These employees have a right to at least an informal hearing before they are discharged. See Kauffman v. Puerto Rico Tel. Co., 841 F.2d 1169, 1173 (1st Cir. 1988). In order to determine whether public employees possess such a property right, the First Circuit requires that the court examine local law and the terms and conditions of the employment arrangement. See Ruiz-Casillas, 415 F.3d at 134. Under Puerto Rico law, public employees are categorized into either career or trust/confidential positions. See id. (citing P.R. Laws Ann. tit.3, § 1349). Trust or confidential employees “intervene or collaborate substantially in the formation of the public policy, [and] . . . advise directly or render direct services to the head of the agency . . . .” Id. (quoting P.R. Laws Ann. tit.3, § 1350). Unlike career employees, who are removable only for cause, trust employees are of “free selection and removal.” Id. (quoting P.R. Laws Ann. tit.3, § 1350). Therefore, “trust [employees] do[] not have a constitutionally protected property interest in

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<sup>2</sup> The court also notes that in his complaint the plaintiff seems to include what could amount to an “inferior to the norm” allegation. Rosario-Urdaz v. Velazco, 433 F.3d 174, 178 (1st Cir. 2006) (“Employment actions short of outright dismissal or demotion are redressable if improperly motivated, but only if the employment action resulted in conditions ‘unreasonably inferior’ to the norm for that position.”) (citing Rutan v. Republican Party of Ill., 497 U.S. 62, 75-76 (1990); Agosto-de-Feliciano v. Aponte-Roque, 889 F.2d 1209, 1218-19 (1st Cir. 1989) (en banc)). Specifically, he alleges that the defendants “demoted [him] to an inferior working position to that to which he is entitled to, assigning to him a salary that is around \$3,000/monthly below to that to which he should be entitled . . . .” (Docket No. 1 at ¶ 57.) However, the plaintiff does not provide further factual allegations comparing his previous career position, his previous trust position, or the position that he presently holds, with the position that he alleges he is entitled to. Such a perfunctory allegation cannot survive the Iqbal standard, which requires that the plaintiff state a claim to relief that is plausible on its face.



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1 that position." Galloza, 389 F.3d at 34.

2 In the case at bar, the plaintiff alleges that, though he had submitted a resignation letter, he  
3 was still functioning as a trust employee when he was transfered. Thus, the plaintiff had no  
4 legitimate expectation of continued employment as a trust employee. Regardless, he was not  
5 dismissed, but placed in a career position as Bus Terminal Administrator. The plaintiff makes no  
6 argument to the court as to what specific property interest he had, as a trust employee, over the  
7 Attorney I position, vis-à-vis the position he was placed in after the transfer. See Feliciano Angulo  
8 v. Rivera Cruz, 671 F. Supp. 103 (D.P.R. 1988) (granting summary judgment for lack of due process  
9 rights where plaintiff had been demoted from a trust to a career position), *rev'd on other grounds*,  
10 858 F.2d 40 (1st Cir. 1988); see also Morales Narvaez v. Oficina del Gobernador, 112 P.R. Offic.  
11 Trans. 959, 967, 112 P.R. Dec. 761, 768 (1982) ("Absent a legislative mandate or other particular  
12 circumstances, the mere holding of a position for a long period of time does not create per se a  
13 property interest if an employee accepted a confidential position.").

14 Accordingly, because the court finds that the plaintiff has no rights to due process for the  
15 demotion, the court must **GRANT** the defendants' motion on this ground and dismiss the plaintiffs'  
16 due process claim.

#### 17 **D. Equal Protection**

18 The amended complaint references a violation of the plaintiff's right to equal protection but  
19 it provides no specific factual allegations to distinguish his equal protection claim from his political  
20 affiliation claim. The plaintiff's failure or inability to make this distinction is dispositive of the equal  
21 protection claim; where there is no distinct basis for alleging an equal protection violation, that claim  
22 is subsumed by the First Amendment claim. See Pagan v. Calderon, 448 F.3d 16, 36-37 (1st Cir.  
23 2006) ("so long as [plaintiff's] allegations of political discrimination fit within the contours of the  
24 First Amendment, they are, *a fortiori*, insufficient to ground a claim that the politically-inspired  
25 misconduct violated equal protection guarantees.").

26 Therefore, the plaintiff's equal protection claim, to the extent it has been alleged, is  
27 **DISMISSED**.

#### 28 **E. Supplemental State Law Claims**

The plaintiff also brought suit under several state laws. "As a general principle, the

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1 unfavorable disposition of a plaintiff's federal claims at the early stages of a suit, well before the  
2 commencement of trial, will trigger the dismissal without prejudice of any supplemental state-law  
3 claims.” Rodríguez v. Doral Mortg. Corp., 57 F.3d 1168, 1177 (1st Cir. 1995). In cases where the  
4 federal claims are dismissed, “the balance of factors to be considered under the pendent jurisdiction  
5 doctrine-judicial economy, convenience, fairness, and comity-will point toward declining to exercise  
6 jurisdiction over the remaining state-law claims.” Id. The use of supplemental jurisdiction in these  
7 circumstances is completely discretionary, and is determined on a case-by-case basis. Id.; see also  
8 Rodríguez Cirilo v. García, 908 F.Supp. 85, 92 (D.P.R. 1995) (“The assertion of supplemental  
9 jurisdiction over state law claims is within a federal court's discretion. If federal law claims are  
10 dismissed before trial, however, the state law claims should also be dismissed.”) (citation omitted).

11 Having dismissed all of the underlying federal claims in this case, the court declines to  
12 exercise supplemental jurisdiction at such an early stage over the related state-law claims. Thus, the  
13 court **GRANTS** the defendants’ motion on this ground and dismisses all of the plaintiff’s  
14 supplemental state-law claims without prejudice.

#### 15 **IV. Conclusion**

16 For the aforementioned reasons, the court **GRANTS** the defendants’ motion (Docket No. 19)  
17 and dismisses all of the plaintiff’s federal claims. The supplemental state-law claims are dismissed  
18 without prejudice. Judgment shall be entered accordingly.<sup>3</sup>

#### 19 **SO ORDERED.**

20 In San Juan, Puerto Rico this 2nd day of October, 2009.

21 *S/Gustavo A. Gelpí*

22 GUSTAVO A. GELPÍ  
23 United States District Judge

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24  
25 <sup>3</sup> The court reiterates its earlier comment in Ocasio-Hernandez v. Fortuno-Burset, ---  
26 F.Supp.2d ----, 2009 WL 2393457 (D.P.R. 2009), that after Iqbal “even highly experienced counsel  
27 will henceforth find it extremely difficult, if not impossible, to plead a section 1983 political  
28 discrimination suit without ‘smoking gun’ evidence.” Id. at \*6 n.4. In effect, Iqbal has created a  
new *de facto* federal abstention ground for political discrimination cases in the guise of a 12(b)(6)  
motion to dismiss standard.